

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2004B112(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RANDY PFAFF,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

THIS MATTER came on for hearing on November 9 and 10, 2004, and January 5 and 6, 2005 in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. The record remained open until January 13, 2005 for the presentation of closing arguments. Complainant appeared through counsel, Sandra Wright, Esquire. Respondent appeared through Melanie Sedlak and Christopher Baumann, Assistant Attorneys General.

MATTERS APPEALED

Complainant Randy Pfaff ("Pfaff" or "Complainant") appeals his July 1, 2003 Corrective Action and January 22, 2004 disciplinary demotion by Respondent, Department of Corrections ("DOC" or "Respondent"), Colorado Territorial Correctional Facility ("Territorial"). Complainant seeks rescission of the Corrective Action and the disciplinary demotion, back pay and benefits, and an award of attorney fees and costs.

For the reasons set forth below, Respondent's Corrective Action is **affirmed** and the disciplinary action is **rescinded**.

PROCEDURAL MATTERS

On April 13, 2004, the undersigned issued an Order Denying Motion to Compel, finding that Complainant's counsel had violated C.R.C.P. 37 by failing to confer with Respondent's counsel prior to filing a motion to compel discovery. Respondent requested sanctions in the form of attorney fees. The order indicated that the issue of an award of attorney fees would be taken up at hearing, and that argument would be heard at that time. At hearing, neither party offered argument.

Rule 37(a)(4)(A), C.R.C.P., provides that when a violation of the discovery rules occurs, the court may enter an award of attorney fees unless "other circumstances make an award of expenses

unjust.” Here, other circumstances render an award of attorney fees unjust.

At the close of evidence in November 2004, Respondent’s counsel requested leave of the ALJ to coordinate the attendance of all of Complainant’s witnesses working at DOC for the January 2005 hearing. Complainant opposed the motion. The ALJ granted the motion, ordering the following:

- Complainant’s counsel would provide Respondent’s counsel with a list of all witnesses to be called on January 5 and 6, 2005, along with prior proof of service of subpoenas and provision of witness and mileage fee checks;
- Complainant’s counsel would provide Respondent’s counsel with a letter to each witness notifying the witness that the new hearing dates were January 5 and 6, 2005;
- Upon receipt of this information, Respondent would arrange for all designated witnesses to appear for hearing on January 5 and 6, 2005.

On November 18, 2004, Complainant’s counsel faxed a lengthy memo to Respondent’s counsel containing the following information: the identity of each witness; the date and time each witness was needed to testify on January 5 and 6, 2005; and proof of service of the subpoenas and provision of witness and mileage fees for each witness. Complainant’s counsel did not provide the letter to the witnesses notifying them of the new date. Nonetheless, Respondent’s counsel had all necessary information to coordinate appearance of witnesses in January, as requested.

Respondent’s counsel did not contact Complainant’s counsel to request that she provide the letters to witnesses. Respondent’s counsel did not inform Complainant’s counsel that based on her failure to provide the letters, he would not be complying with the ALJ’s order to coordinate appearance of witnesses on January 5 and 6, 2005. In late December, Complainant’s counsel contacted witnesses and learned they had not been contacted or coordinated for the January hearing dates. Complainant incurred significant attorney fees in coordinating witnesses’ appearance in January. Under these circumstances, an award of attorney fees for violation of C.R.C.P. 37 would be unjust.

ISSUES

1. Whether the Corrective Action was arbitrary, capricious, or contrary to rule or law;
2. Whether Complainant committed the acts for which he was disciplined;
3. Whether Respondent’s disciplinary action was arbitrary, capricious or contrary to rule or law;
4. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant commenced employment at DOC as a Correctional Officer (CO) I in July 1995.

After ten months of employment he promoted to Sergeant. In December 2000 he promoted to Lieutenant.

2. Complainant has consistently received Commendable performance ratings at DOC. He is well liked and respected by his subordinates.
3. In May 2003, Complainant received a notice of layoff. He was traumatized by this and developed stress related illnesses requiring that he take time off from work.
4. Complainant was on medical leave for approximately five weeks in late May and most of June 2003.

Events of June 25, 2003

5. On June 24, 2003, Complainant returned to work in the infirmary at Territorial, where he served as the supervising lieutenant.
6. One of the lieutenants' duties is to complete the staff schedule for the following month. Normally, this is done by the 15th day of the previous month. However, in June of 2003, due to the layoffs, it had been impossible to complete the schedule by that date. In late June 2003, most of the correctional officers had received notice the abolishment of their positions were being rescinded.
7. On June 24, 2003, the date Pfaff returned to work after his long absence, he had not received any notice his position was to be reinstated. He was upset about the prospect of not having a job in a week's time.
8. On June 24 and 25, Pfaff attempted to complete the July schedule. However, he was unsure as to whether he needed to find a replacement for both himself and one other officer. He was very agitated about the situation.
9. On June 25, 2003, Captain Scott, who was filling in for Pfaff's regular supervisor, walked through the infirmary and asked Pfaff if the July schedule was done. Pfaff gave it to him. Scott noticed that there were still shifts unfilled and mentioned this to Pfaff, who responded, "I don't even know if I'm going to be here." Pfaff was visibly upset when he said this to Scott.
10. Pfaff informed Scott that he had worked on the schedule as much as he could, and that without information on who would be working in July, he had done all he could.
11. Captain Scott ordered Pfaff to call other lieutenants to fill the schedule. Pfaff, very upset about his own situation, stated that he would not do it.
12. It was the normal practice of lieutenants to call the other lieutenants to find staff to fill holes

in the schedule. Therefore, Scott's order was appropriate and necessary in the situation.

13. Captain Scott repeated his order to Pfaff. Pfaff repeated, "I'm not gonna do it," or words to that effect. Captain Scott told Pfaff to assume he and one other officer whose position had been abolished would not be there in July and make the schedule based upon that assumption. This upset Pfaff even more.
14. Captain Scott did not acknowledge to Pfaff that he understood why he was upset, or that his situation was a difficult one. This also upset Pfaff.
15. Captain Scott felt that Pfaff had been insubordinate by violating a direct order to call the other lieutenants for additional staffing. He told Pfaff he was being insubordinate. Then Scott returned to his office.
16. Scott called Pfaff on the telephone and ordered him to complete the schedule again. Pfaff again refused.
17. Captain Scott asked Pfaff to come to his office. He knew Pfaff was upset about his job having been abolished, and that this fact had been the driving force behind his attitude. He decided to give Pfaff one more opportunity to complete the schedule. When Pfaff arrived in his office, he said to him, "I gave you an order. I have asked you to complete the schedule. Call the other lieutenants and get minimum staffing." Pfaff's response was the same, that he was not going to do it.
18. Scott then called his supervisor, Major Maifeld to report the situation. Maifeld was aware that Pfaff had been absent for stress related illness caused by his layoff. She asked Scott to escort Pfaff to her office.
19. On the way to the Major's office, Pfaff informed Scott that his blood pressure was high, he was feeling dizzy, and he was having chest pains. Scott stated that when they arrived he would inform the Major and get him help if needed.
20. Scott went into the Major's office first and met privately with her for at least five minutes, while Pfaff waited outside in the hall. Scott informed Major Maifeld that Pfaff had medical issues that needed to be addressed right away.
21. The three then met in a nearby office. Major Maifeld noticed immediately that Pfaff appeared angry, red in the face, and tense. Major Maifeld asked Pfaff how he was doing, and Pfaff stated that he was experiencing chest pains. She stated that he needed to take care of that first, before they met. Pfaff responded that he wanted to have the meeting first. He was angry and tense, his voice was shaking.
22. Major Maifeld asked Pfaff repeatedly if he was sure he didn't want medical attention right away, and he responded, "No, I'm ok."

23. Maifeld asked Pfaff what issues he had with completing the schedule. He responded, "I'm not even going to be on that schedule." He said he had worked on it as much as possible, and that he would not complete it. He said, if he wasn't going to be there in July, why should he complete it. Maifeld said, because it was his responsibility. Pfaff said that was true. He was still angry. Maifeld asked if he was angry and refusing to complete the schedule because his position had been abolished. Pfaff said yes. She asked if he was taking it personally. He said yes. She discussed the fact that the state as a whole had incurred budgetary cuts that had resulted in abolishment of positions.
24. The Major asked Pfaff, "Do you hear what you're saying, that you are being insubordinate?" Pfaff was visibly upset, his face was red. He stated repeatedly he didn't know if he would be on the July schedule.
25. Maifeld was concerned about Pfaff's thinking process. She felt that if he was refusing to complete such a simple administrative task, she was unsure whether she could trust him in an emergency situation at the prison.
26. Major Maifeld ended the meeting by stating that Pfaff needed medical attention, and informing him that even though he said he was ok, he could not return to work until he submitted a fitness to return to work form.
27. Scott then escorted Pfaff to the infirmary. The nurse took his blood pressure and immediately ordered that Pfaff be sent to the workers compensation clinic. The medical personnel at that clinic immediately referred Pfaff to the emergency room of the nearby hospital. One of the doctors who treated Pfaff instructed him not to return to work.
28. Scott wrote an incident report describing the June 25, 2003 incident and forwarded it to Warden James Abbott.¹ Scott had a close working relationship with Warden Abbott, as a member of his management team.

July 1, 2003 Corrective Action

29. On June 26, 2003, Warden Abbott called Pfaff at his home at 1:45 p.m. and left a voice mail requiring him to be in his office by 2:00 p.m. Pfaff did not get the message until that evening. Pfaff was intimidated by this call and was troubled by the Warden's tone of voice. He therefore contacted an attorney and asked her to call the Warden on his behalf. She did so, but the Warden did not return her call.
30. On June 30, 2003, Pfaff's attorney made telephone contact with Warden Abbott and informed him of Pfaff's medical condition and her representation of Pfaff. She explained that in view of his medical condition it was in Pfaff's best interest that all prison managers

¹ Warden Abbott began to serve as Warden at Territorial in April 2003.

Speak to her instead of directly to Pfaff while he was on leave. She also requested that all correspondence be directed to Pfaff through her office.

31. Warden Abbott indicated he would not communicate with her. He stated he would only communicate with Pfaff directly concerning the “administrative matter” he sought to discuss. He then referred Pfaff’s lawyer to the prison’s attorney.
32. Prison counsel advised Pfaff’s counsel that the purpose of Warden Abbott’s call on June 26 had been to advise him that the abolishment of his position had been rescinded. Pfaff’s counsel accepted the reinstatement of his position on his behalf.
33. Neither Abbott nor prison counsel informed Pfaff or his counsel that Warden Abbott sought to discuss the events of June 25 with him.
34. Pfaff did not return to work until July 8, 2003.
35. On July 1, 2003, while Pfaff was on stress related leave from work, Warden Abbott issued a Corrective Action letter to him, stating in part:

“On June 25, 2003, Captain Scott gave you a directive to attempt to complete the infirmary schedule, by contacting other supervisors within the facility to obtain assistance with coverage. You verbally refused to follow this directive. Captain Scott made more than one attempt to get you to comply, but you repeatedly refused. During a subsequent meeting with Captain Scott and Major Linda Maifeld you admitted refusal to follow Captain Scott’s directive.

“During the interview with Captain Scott and Major Maifeld, you cited reasons for refusing the directive. You stated you were stressed out due to the current situation with your job status and that you had been doing job assignments which should have been completed by someone else. The reasons you gave to not excuse your behavior, which was inappropriate, unprofessional and unacceptable.

“In reviewing all the information provided, I find that on June 25, 2003, you were in violation of [DOC] Administrative Regulation (AR) 1450-1, Staff Code of Conduct. HH. Staff shall comply with and obey all DOC administrative regulations, procedures, operational memorandums, rules, duties, legal orders, procedures and administrative instructions. . . . Failure to obey any lawfully issued order by a supervisor, or any disrespectful, mutinous, insolent, or abusive language or actions toward a supervisor is deemed to be insubordination”

36. Warden Abbott ordered Complainant to comply with all reasonable directives which do not

violate policy, procedures or statutes, issued by a supervisor. He required Complainant to attend "Ethics and Professionalism" at the DOC training academy within the next three months, and to submit a written apology to Captain Scott regarding his insubordination.

37. The corrective action letter stated, "If you fail to comply with the provisions of this corrective action, you will be subject to further corrective and or disciplinary action."

State Personnel Board Grievance Rule R-8-8

38. Board Rule R-8-8 states in part: "The grievance process is designed to address and resolve problems, not to be an adversarial process. Departments must inform employees of how to proceed through the grievance process. . . Each department must establish a process which complies with the following: . . .

1. An employee must initiate the grievance process within 10 days of the action or occurrence being grieved . . . To initiate the grievance process, the employee shall notify the supervisor and/or second level supervisor, as provided in the department's grievance process. An informal discussion will be held to attempt to resolve the grievance. The employee shall be informed in writing of the decision within 7 days after the discussion. . . .

2. The decision reached at the informal stage shall be binding on the parties, unless the employee elects to proceed to the formal written process. . . .if the grievance concerns the actions of the appointing authority the department may, but is not required to, provide a process by which a different individual issues the final department response. . . .

3. The employee has 10 days to file a petition for hearing with the board after receipt of the final department decision, or after expiration of 30 days or any extension period. . . .

4. An employee may be represented by any person of the employee's choice at any step(s) of the grievance process. That person may participate and speak for the employee. The employee is expected to participate in the discussion during the grievance process.

Grievance of Corrective Action

39. Pfaff received the Corrective Action letter on July 7, 2003.
40. He returned to work on July 8, 2003. On that date, Pfaff was summoned to Major Maifeld's office to discuss the Corrective Action and the June 25 interaction with Scott. Pfaff pointed out that he had retained an attorney to assist him in grieving the Corrective Action.

41. On July 9, 2003, Pfaff was summoned to Warden Abbott's office. His supervisor, Captain Dean, accompanied him. Abbott asked Pfaff why he had not contacted him. Pfaff responded that he had no idea he was supposed to contact him.
42. At the July 9 meeting with Warden Abbott, Pfaff informed the warden that he had written a statement regarding the June 25 incident with Captain Scott, and he offered to give it to the warden. He also offered to discuss the incident.
43. Warden Abbott responded that he did not want to discuss it, and that he did not want to review his statement. He did not accept the statement Pfaff offered to him. Pfaff asked Warden Abbott, "Don't you want to hear my side of it?" or words to that effect. Warden Abbott responded, "I have already made my decision. Go ahead and grieve it" or words to that effect.

July 14, 2003 Grievance of Corrective Action

44. On July 14, 2003, Complainant's attorney filed a written grievance of the Corrective Action with Warden Abbott in the form of a four-page letter. The "re" line of the letter is "Notice of Corrective Action/Grievance." In the body of the letter, she refers to the letter as a "grievance" of the Corrective Action. She asserted claims of retaliation for having used Family Medical Leave Act leave, for appealing his layoff, and for having a disability under the ADA.² She stated that DOC's actions were creating a hostile work environment for Pfaff.
45. Pfaff's lawyer reminded Warden Abbott of her previous request that all correspondence with Pfaff be through her. She stated,

"I advised you on June 30, 2003 that communications regarding Lt. Pfaff should be directed to me. I explained that this was necessary due to the medical problems Lt. Pfaff was experiencing. While Lt. Pfaff was out on leave for among other things, high blood pressure and work-related stress, you issued this corrective action and instead of delivering it to me, you made sure that Lt. Pfaff received it directly. Within a couple of days of return to work on July 8, 2003, he was called into several meetings with you and other officers. Any further meetings with Lt. Pfaff need to be scheduled in advance through my office so that I may be present. All communication and correspondence must be directed to me and not to Lt. Pfaff, with the exception of what is absolutely necessary for the day-to-day operations of the DOC."
46. Counsel for Complainant requested a copy of the grievance procedures for DOC and that she be contacted to schedule a meeting to discuss the grievance.

² There is no ADA claim in this case.

47. On July 21, 2003, the DOC Manager of Dispute Resolution wrote Complainant's counsel a letter. It stated in part, "I am writing to inquire whether the letter dated July 14, 2003 is a Step I grievance from Mr. Pfaff. The reason for my inquiry is two-fold. First, the State Personnel Board Rules, specifically R-8-8, found at 4 CCR 801, as well as DOC Administrative Regulation 1450-24 require that the employee file the grievance. While the Department recognizes your role as counsel for this employee and your representation of him pursuant to the Rules of Professional Conduct, the Department, as Mr. Pfaff's employer, has the authority and obligation to discuss personally with Mr. Pfaff any grievance he wishes to pursue under the State Personnel Rules as well as the corrective action issued to him. . . . Board Rule 8-8 requires the employee to initiate the grievance process. Furthermore, the rule states, 'The grievance process is designed to address and resolve problems, not to be an adversarial process.'"
48. The Manager's letter stated that the grievance rules "require the Appointing Authority to meet informally. The two parties must be able to informally discuss and resolve the issue in the grievance. The rule does not prohibit either party from having a representative present at the meeting, however, the employee must personally participate in the grievance process in accordance with [the rules]. Your letter is unclear as to whether or not this communication represents a Step 1 grievance from Mr. Pfaff, and Mr. Abbott as an Appointing Authority must be able to communicate with Mr. Pfaff personally regarding his grievance."
49. Complainant's counsel then spoke with the dispute resolution manager on the telephone. Counsel for Complainant pointed out that DOC had no authority to deny Complainant representation at any stage in the grievance process, under Board and DOC rules governing grievances. Counsel also pointed out to the manager that no rule prohibited an employee from using a representative to file a grievance, and no rule required that the employee initiate the grievance.
50. The Manager attempted to establish a date for the informal meeting, but counsel indicated that she believed Step 1 had been bypassed by DOC and she sought to proceed to Step II. The Manager referred counsel to Gene Atherton, Associate Warden at Territorial. Counsel sent a confirming letter in which she threatened legal action if DOC continued to correspond with Lt. Pfaff directly.
51. The two then exchanged letters that accused the other of unprofessional conduct and re-stating their respective interpretations of the grievance rules.
52. In late July 2003, Respondent transferred Pfaff from the day shift to the graveyard shift, effective August 1, 2003.
53. On July 23, 2003, Pfaff's attorney filed the Step II grievance of the Corrective Action with Mr. Atherton. She requested that all correspondence regarding the grievance and the meeting go through her. She noted in the letter that the transfer of Pfaff to graveyard shift

appeared to be retaliation for filing the grievance. She attached copies of the July 1 corrective action, the July 14 grievance, the July 21 letter from the dispute resolution manager to her, and the July 21 letter from herself to that manager.

Transfer of Complainant to Graveyard Shift; Grievance

54. When Pfaff received notice of his transfer to graveyard shift, he was aware that two other lieutenants had requested the graveyard shift. Pfaff had not requested this transfer and did not desire to work graveyard shift.
55. On July 28, 2003, Complainant, through counsel, timely grieved this shift transfer, noting that two other lieutenants had previously submitted written requests for graveyard shift. He contended that the transfer was retaliatory for having filed appeals of DOC actions, his prior grievance, and his medical leave. He stated that the reassignment was imposed “as a means of forcing Lt. Pfaff to quit in creating a hostile work environment.”
56. On July 30, 2003, Associate Warden Kevin Milyard denied Complainant’s grievance of the shift transfer, noting that according to a DOC staffer, there were no letters on file from others requesting the shift. He stated that Pfaff was “not the primary person assigned to the graveyard position” but that since the primary person could not report on August 1, he was being placed in the position. He cited “facility needs” and the future direction prison management was heading in view of the need to be fiscally sound.

Officer Dickens Assignment

57. In the Fall of 2003, Territorial managers became aware that Correctional Officer Dickens had become sexually involved with an inmate, and had paid to have her husband killed. DOC’s criminal investigations division was involved in the case.
58. Warden Abbott, Major Maifeld, and others on the management team met to discuss where to place Officer Dickens during the pendency of the investigation. The inmate with whom she was involved had been removed from Cellhouse 7, but they determined that Dickens should still have no contact with that inmate’s contacts in Cellhouse 7.
59. Officer Dickens had been out on medical leave due to a shoulder injury and was due to return in early November 2003. Warden Abbott, Maifeld, and the others decided to place Dickens on Cellhouse 5.
60. On November 5, 2003, Major Maifeld wrote the following email to Pfaff, his direct supervisor, Captain Dean, and Captain Jaramillo:

“Is this workable for you guys on graveyards until we get some more people in? I’ve asked Capt. Jaramillo and Lt. Serena to help with the movement because I just don’t have the time to devote to it. Also CO Dickens needs to be assigned to CH 5 cage

anytime she works due to her restrictions and safety issues with her arm. We talked today about it and with CH 5 being a lockdown facility, it would be much safer for her there than anywhere else in the facility. Please keep us posted if there are any other issues which come up. Thanks everyone!”

61. When Captain Dean and Pfaff received this email message, they talked about where was the safest place to assign Dickens, so that her injured arm would be protected. Lt. Pfaff, attempting to comply with Maifeld’s directive, informed Dean that Cellhouse 5 was not the safest place for Dean, because she would have to do a count during the shift requiring her to walk past the cells with bar, instead of doors. She would therefore be vulnerable to the inmates grabbing her body as she walked past.
62. Dean and Pfaff were unaware that Dickens was under investigation for attempted murder.
63. They determined that Cellhouse 7 was the safest place to put Dickens. Dean and Pfaff were attempting to comply with Major Maifeld’s directive when they made this decision.
64. Captain Dean was Pfaff’s supervising officer and was responsible for this decision.
65. On November 7, 2003, Maifeld learned that Dickens had been assigned to Cellhouse 7. She was upset, and discussed it with Warden Abbott and Associate Warden Milyard. They determined that in order to preserve the confidentiality of the investigation, Dickens would be left in that assignment.
66. Dickens remained on Cellhouse 7 for the next three weeks, until her arrest. She was ultimately convicted of attempted first degree murder and is serving a 16-year prison sentence.
67. Maifeld never discussed the November 5 email and Pfaff’s failure to comply with it with Pfaff prior to the imposition of the disciplinary demotion.

Call-off procedures; Pfaff attempt to solve the problem

68. At DOC, it is common to have staff shortages that require other staff to fill in. When a supervisor calls a staff member at home to come in during time off, this is referred to as a “call off.” In November 2003, following the reduction in force, call-off’s were even more common at DOC.
69. After Pfaff was reassigned to the graveyard shift as the supervising lieutenant, he quickly learned that only a small number of graveyard staff were actually called off. Many staff members either didn’t answer their telephone when called, or weren’t called because they lived far away from the prison. All staff assigned to the graveyard shift understood that this disparity in call-offs was unfair.

70. In an effort to even the playing field, Pfaff talked to every officer under his supervision about developing a equitable way of handling staff shortages and call-offs. He developed a system whereby once a month each staff member would call in at 6:00 or 7:00 p.m. to see if they were needed for an extra shift. Under this system, each staff member knew that one day per month he or she might need to come in; otherwise, there was no concern about being called off.
71. Captain Dean approved of this call in plan.
72. Lt. Pfaff posted the call in list on every monthly schedule.
73. Major Maifeld learned about this call off schedule. She was concerned, as it appeared to violate the state personnel procedures prohibiting staff from being placed on “on call” status. Maifeld reported to Warden Abbott that Pfaff kept a schedule of staff on call. He told Maifeld to “clear it up.”
74. Maifeld then formulated a new system under which the staff roster would rotate; of the top three names on the list, one would have to stay over to cover the next shift. It was up to the top three names on the list to agree on who would stay over to the next shift. If any of the three top names refused to remain on duty to work the next shift, that refusal would constitute insubordination.
75. On November 5, 2003, Maifeld sent an email order to all supervising officers at Territorial, stating,

“I know with all of the call offs and staff shortages we have had here, the frustration level is growing with both supervisors and staff. I also know the supervisors are trying very hard to make it fair across the board as to who pulls the overtime shift. As we stated earlier in our meeting, each supervisor needs to make a roster as to who on shift will have to stay over if required.

However, we can not make a staff person call in to the facility on their day off to see if they will be needed for post coverage on that day because this places them in an “on call” or “stand by” situation. We are not authorized to do this per personnel rules. Only Appointing Authorities are authorized to place individual staff members in a stand by mode – like during an emergency situation.

I realize the intention was good and was done in an attempt to be fair to all staff. Please, get your rosters up and running, dates of last overtime, roll those to the bottom and the rest will rise to the top. If you have to pass someone constantly because you can’t get them on their day off, then let them know they will have to take their turns, (the ones they missed) anytime they are on duty. We need to make a concerted effort to include all staff in

our shortage issues. With documentation, this can be achieved. . . .”

76. Lt. Pfaff stopped using his call off calendar after receiving Maifeld’s email.

Kevin Johnston

77. Kevin Johnston was a CO I on graveyard shift under Pfaff. He had been one of the officers not previously subjected to call offs. It was known among Territorial staff that he opposed the new call in procedure developed by Pfaff.
78. In the Fall of 2003, Captain Jaramillo came to see Johnston and asked him to write a statement to use against Pfaff, regarding the call off calendar. He told Johnston that Warden Abbott was waiting on paper to discipline Pfaff and Dean.
79. During the same period, Johnston received a telephone page at home from Bobbi Taylor, a Sergeant. Johnston returned the page and found it was Taylor. Taylor asked Johnston to write a statement against Pfaff on the on call calendar. Johnston said that he did not agree with the practice but he would not write up Pfaff. Taylor pressured Johnston, stating that he (Taylor) had the backing of Major Maifeld, Associate Warden Milyard, and Captain Jaramillo. Taylor then directed Johnston on how to do it, by going upstairs to Cellhouse 3, getting on the computer and typing up a letter, and placing it in Major Maifeld’s in box.
80. Johnston told Taylor he would think about it. Taylor called Johnston at home the next day to ask if he was going to write the letter. Johnston said no; he never wrote the letter.
81. Johnston testified at hearing and was credible. He had no motive to make up this story.
82. Other Territorial employees were approached for evidence against Pfaff in a similar manner.

Timesheet Issue

83. The only supervisory staff at Territorial who have access to payroll records are those at the lieutenant level and above. It is a daily occurrence, however, for lieutenants to order their sergeants to go into the computer and change the payroll information. This is only done under direct order of a lieutenant or a captain.
84. In the late Fall of 2003, Major Maifeld began an investigation into whether Pfaff was manipulating time sheet and payroll information as an act of favoritism for certain staff.
85. Maifeld reviewed schedules, assignments, and payroll documentation to see if there was a pattern of favoritism.
86. DOC staff are paid in 28 day cycles. During those cycles, staff must work a minimum of 160 hours. If they work less they must take leave. If they work over 171 hours they are

entitled to overtime pay, which as a practical matter is taken as compensatory time (comp time).

87. DOC employees are given 30 minutes of credit for work for each shift they work, to reflect time spent at roll call. If an employee works the customary 20 shifts per month, those extra 30 minute credits total ten hours, thereby bringing that employee's shift total from 160 to 170 hours.
88. Maifeld used timesheets for her investigation that were not final.
89. Maifeld relied on July 2003 graveyard timesheets to conclude Pfaff had manipulated the timesheets to give unearned time off. However, he was not assigned to the graveyard shift until August 2003. Maifeld erred in attributing July 2003 timesheet manipulation issues to Pfaff.
90. Maifeld also relied on August 2003 timesheets to conclude Pfaff had manipulated the timesheets to give employees unearned time off. Pfaff was not involved in timesheets or payroll in August 2003, his first month assigned to graveyard shift.
91. Maifeld concluded that on September 17, 2003, Pfaff had given Officer Charity Sheriff a day off she had not earned. However, this was an error, as Sheriff was actually at the shooting range on that day.
92. Supervisors are permitted to give employees a day off and not charge any type of leave, if the employee makes up the time by working an extra shift. This is a common, standard practice.
93. It is the general practice of supervisors at DOC to manipulate timesheets so that an employee does not accrue overtime.
94. Days off are reflected by there being no entry in the time sheet. Therefore, in order to confirm that a day off was not a trade for a day worked, Maifeld would have had to discuss the information she reviewed with both Pfaff and any employees she felt had benefited from a timesheet manipulation.
95. Major Maifeld did not conduct that follow-up inquiry. In fact, she never discussed any of the timesheet manipulation issues with Pfaff. When she forwarded the results of her search to Warden Abbott, it was without the benefit of an objective, thorough investigation.
96. Had Major Maifeld conducted any investigation into the accuracy of her assumptions, she would have learned that Pfaff did not work on graveyard shift in July 2003, did not perform timesheet or payroll tasks on graveyard shift in August 2003, and did not give Officer Sheriff unearned time off on September 17, 2003.

Atherton Requirement that Pfaff Sign Grievance

97. In mid-November 2003, Gene Atherton, Assistant Director of Prisons and Warden Abbott's supervisor, acknowledged receipt of the Step II grievance from his attorney "in the matter of your grievance against the DOC's decision to issue you a corrective action dated July 1, 2003." The letter rejected that grievance and required that Pfaff submit the grievance himself. Atherton stated that DOC AR 1450-24 Employee Grievance System, states that "Only employees employed under the state personnel system may file a grievance." He indicated, "I am willing to waive time frame requirements and review your concerns at Step II should you choose to file according to administrative procedure."
98. On November 28, 2003, Pfaff signed the grievance of the July 1, 2003 Corrective Action and submitted it to Atherton. Pfaff's attorney sent a cover letter indicating that she disagreed with his interpretation of the grievance rule, and quoted from DOC's AR 1450-24, Part IV, which states, "The employee may be represented by a party of his/her choosing at either step of the grievance process." She stated that despite her disagreement, she was sending her client's signature on the grievance form. She also stated, "You should already have all other pertinent documentation as such was delivered to you back in July and August."
99. She also stated, "All correspondence regarding any and all grievances must go through my office. I trust you, nor any other [DOC] personnel, will not be making further contact with my client regarding these matters."
100. Pfaff's attorney believed that Pfaff was excused from complying with the terms of the Corrective Action during the pendency of the grievance. Pfaff had a good faith belief this was the case based on that advice and on the language of the Corrective Action addressing the grievance process.

Atherton Response to Grievance Addressing Shift Change, not Corrective Action

101. On December 19, 2003, Atherton responded to Pfaff's November 28, 2003 Grievance. He stated that he assumed the grievance referred to the graveyard shift issue and denied the grievance on grounds the decision was made based on seniority. He did not address the Corrective Action.
102. Complainant appealed the Atherton decision to the State Personnel Board.

Correspondence Regarding R-6-10 Meeting on Violation of Corrective Action

103. On December 8, 2003, Warden Abbott sent Pfaff a certified letter which was dated November 22, 2003. Pfaff received the letter on December 9, 2003. It stated that despite the fact his attorney had filed a grievance on his behalf challenging the July 1 Corrective Action, because Pfaff had failed to contact the Training Coordinator to schedule his training session,

he was scheduling a pre-disciplinary meeting for his failure to comply with the Corrective Action.

104. Warden Abbott set the meeting for December 12, 2003.
105. Abbott did not arrange to have Pfaff or his attorney contacted to clear the date.
106. On December 10, 2003, Pfaff's attorney wrote and faxed a letter to the attorney for Territorial, stating that Warden Abbott had directed her to contact her instead of Abbott. She pointed out that Pfaff had signed and submitted the grievance to Gene Atherton on November 28, 2003, as required by DOC. She noted that since the grievance was ongoing, "a R-6-10 meeting seems inappropriate at this time." She also noted that two days' notice was not reasonable.
107. She requested that in the event Warden Abbott went forward with the R-6-10 meeting, that her office be contacted for scheduling.
108. On December 10, 2003, Warden Abbott's attorney sent an email message to Pfaff's attorney stating, "I am in receipt of your letter faxed to my office this date. Please be advised that Warden Abbott will be happy to communicate with you directly should you choose to speak with him. Unfortunately, we are unable to honor your request to have all communications between a corrections employee and his supervisor facilitated through his counsel. Warden Abbott will continue to communicate directly with Lt. Pfaff as is necessary. Warden Abbott will gladly accommodate your request to reschedule the R-6-10 meeting. It will now be held on Wednesday, December 17, 2003."
109. On December 10, 2003, Warden Abbott wrote Pfaff a letter indicating he had cancelled the December 12 meeting "per the request of your attorney." "I have rescheduled the meeting for Wednesday, December 17, 2003 at 0930 hours. This meeting will be held in my office at [Territorial]."
110. Pfaff's attorney was not available on December 17. On December 11, 2003, she wrote Warden Abbott to advise him that December 17 was not available and asked that she be contacted for rescheduling. She threatened legal action if DOC continued to violate Pfaff's right to have legal representation on the matter.
111. On December 16, 2003, Warden Abbott authored a letter to Pfaff, giving several dates for the R-6-10 meeting, December 22, 23, and 24, 2003, and January 6, 2004. The letter indicated that Pfaff's attorney had been copied on the letter, but she was not.
112. Pfaff did not pick up his certified mail on the first or second day it was delivered.
113. On December 23, 2003, Warden Abbott wrote a memorandum to Pfaff indicating that according to the post office, the December 16 certified letter had been delivered to his

residence on December 17, 2003 but “you have not picked up the letter. A copy of this letter was also mailed to your attorney. . . . This is notification to you that since you failed to pick up this letter and respond by the 12/19/03 deadline, your R6-10 (sic) meeting has been rescheduled to Tuesday January 6, 2004 at 0930 hours. There will be no further attempts to reschedule this meeting with you.”

- 114. Warden Abbott ordered Associate Warden Kevin Milyard to hand-deliver this memo to Pfaff at Territorial in the Shift Commander’s office at 3 a.m. on Christmas Eve, 2003. The memo was marked as having been copied to Pfaff’s attorney. Pfaff signed for it.
- 115. Neither the memo nor the letter was copied to Pfaff’s attorney.
- 116. Lt. Pfaff had changed his vacation time to include January 6 in order to accommodate the vacation schedule of Captain Dean. Based on that prior arrangement, Pfaff had plans to be in Texas on January 6, 2004.
- 117. Warden Abbott did not check with Pfaff or his attorney prior to setting the January 6, 2004 pre-disciplinary meeting date. Therefore, he was unaware that Pfaff would be on pre-approved vacation leave on that date at the time he sent all correspondence concerning that date.
- 118. Had Respondent contacted Pfaff or his attorney to schedule the R-6-10 meeting, the meeting would have occurred.
- 119. Respondent never contacted Pfaff or his attorney in order to clear a date for the R-6-10 meeting. All dates were set without clearing them with Complainant or his attorney.
- 120. By January 5, 2004, having not been contacted to schedule a meeting, and having not received copies of correspondence regarding the pre-disciplinary meeting, Pfaff’s attorney called Associate Warden Milyard to inform him that Pfaff was on vacation out of state on January 6, 2004, and requested that she be contacted to schedule the meeting.
- 121. On dates unknown, Major Maifeld reported to Warden Abbott that Pfaff had violated her order to place Dickens in Cellhouse 5. Abbott asked her why; Maifeld responded she did not know. Maifeld reported to Abbott that Pfaff had falsified time records. Warden Abbott reviewed the timesheets Maifeld provided; according to Warden Abbott, he “did not get specific with payroll” staff in discussing those records or “talk to them [payroll staff] about the information” he received.

Suspension with Pay

- 122. On January 8, 2004, Warden Abbott placed Pfaff on administrative suspension with pay, pending investigation of an inmate uprising that had occurred on December 25, 2003. Pfaff had been the commanding officer of the prison that evening.

123. On January 22, 2004, after Warden Abbott received the report on the uprising, he reinstated Pfaff and took no action against him relating to the December 25, 2004 uprising.

January 8, 2004 Letter Regarding Intent to Impose Discipline on Three New Issues

124. On January 8, 2004, Warden Abbott sent Pfaff a letter indicating he would make no more attempts to meet regarding potential disciplinary action.
125. Up to that date, the only reason Warden Abbott had provided in his notice of pre-disciplinary letters as grounds for potential discipline was Pfaff's failure to comply with the terms of the July 1, 2003 Corrective Action.
126. The January 8, 2004 letter informed Pfaff that he intended to impose discipline on the basis of three additional allegations that had never been discussed with or referenced to Pfaff. The letter described them as follows:
- "Falsification of official payroll time sheets.
 - Failure to comply with orders for scheduling of Officer Pamela Dickens.
 - Orders given by you to your subordinate staff that they are on-call and need to call the facility on their days off."
127. Respondent did not provide Complainant with any information regarding these allegations other than what appeared in the January 8, 2004 letter, prior to demoting him.
128. The January 8 letter cited Rule R-6-10(A), which stated, "When reasonable attempts to hold the [pre-disciplinary] meeting fail, the appointing authority must send a written notice, to the last known address of the employee, advising the employee of the possibility of discipline and stating the alleged reasons. The employee has 10 days from the receipt of the notice to respond in writing. If the employee refuses to accept the notice, a dated return receipt from the mail carrier is conclusive proof of the attempt to deliver and the period to respond begins on that date."

Drafting of Demotion Letter

129. Pfaff's response to the January 8, 2004 letter was due on January 18, 2004.
130. Prior to the response date, Warden Abbott ordered his administrative assistant to coordinate with the DOC Human Resources Office in Colorado Springs to draft a letter demoting Pfaff to Sergeant.
131. On January 13, 2004, the HR staffer sent a revised draft of the demotion letter to Warden

Abbott's assistant. The title of the email was "Revised Pfaff Disciplinary Action." The email states in part,

"Mr. Abbott asked that I e-mail you the revised draft of the Pfaff letter, so that you will already have it to work on when Mr. Abbott gets back.

"If you hand-delivered the "request to submit" letter to him on January 8, the ten days for him to respond would not be up prior to the 18th, a Sunday, so Mr. Abbott should not try to get the letter out this Friday. I dated the letter the 19th.

"You will need to make some adjustments to the draft, depending on whether he submits a response and if so, what that response consists of. I drafted that into the letter after each allegation, but if his response is minimal or doesn't address each specific allegation, you could just do one 'your response' at the end of the listed allegations, to cover all the allegations."

132. On January 14, 2004, Pfaff's attorney responded to the January 8, 2004 letter listing the three new areas of potential discipline. She noted that these were new allegations and that no details of the allegations had been provided. She stated it was difficult to address the matters more specifically than to provide a general denial. She noted that no attempt to meet regarding these allegations had ever been made; that the only correspondence regarding a pre-disciplinary meeting had concerned the July 1 Corrective Action.
133. Pfaff's attorney offered to meet on January 14, 16, 22, 23, or 27, 2004, regarding the new allegations.
134. Warden Abbott did not respond to this letter. At hearing, when asked if he had had the opportunity to meet with Pfaff regarding the three new allegations of misconduct, Warden Abbott responded, "Correct, but I chose not to."

Demotion of Pfaff

135. On January 22, 2004, Warden Abbott demoted Pfaff from Lieutenant to Sergeant. The letter cited four issues as forming the basis for the demotion:
 - Failure to Comply with Corrective Action. "Major Maifeld has informed me that you have not followed through with your corrective action in any fashion. [Y]ou have continued not to comply with reasonable directives of a superior, which will be addressed in detail below as current issues #2 and #3. [Y]ou have made not attempt to schedule or attend the training. [Y]ou have not submitted a written apology to Captain Scott."
 - Failure to place Officer Dickens in Cellhouse 5 as "blatant and flagrant insubordination," per the November 5 e-mail from Major Maifeld. Warden

Abbott stated in part, “you have continued with your gross insubordination in your position of Relief Shift Commander.”

- Continuation of the call in procedure after Major Maifeld sent the email directive on November 5 to stop that procedure. The letter stated that he had given verbal instructions to call in on their days off after receiving this email. It also indicated that Major Maifeld had found a call in schedule for four days in December with the notation, “Call here at the facility at 6:00 p.m. to see if hospital is needed.”
- Falsification of time and pay records. Warden Abbott stated he had given a staff person one day off in August 2003 and had not subtracted any type of leave for the time off, that he had allowed that same staff person to have nine consecutive days off in September 2003, and had charged only 2.02 of comp time for a day off, and that he had entered the hours of 0800 – 0830 as the equivalent of an entire day off. He indicated, “Major Maifeld checked the official sign in sheets and that staff person did not sign in or out on that day.”

136. Warden Abbott cited Pfaff with having violated the following DOC regulations:

- DOC Staff Code of Conduct, AR 1450-1, N. “Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff’s ability to perform effectively and efficiently in his or her position, or casts doubt on the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion;
- Code of Conduct, X. Staff shall neither falsify any documents nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation.
- Code of Conduct HH. Staff shall comply with and obey all DOC administrative regulations, procedures, . . . rules, duties, legal orders, procedures and administrative instructions. . . . Failure to obey any lawfully issued order by a supervisor, or any disrespectful, mutinous, insolent, or abusive language or actions toward a supervisor is deemed to be insubordination.
- DOC AR 100-37, Employee Scheduling, Correctional Officers are scheduled on the 28 day work period allowed under FLSA 7k exemption rules. The minimum to be scheduled in each 28 day period is the equivalent of either 20 eight hour shifts, 16 ten hour shifts, or 13 twelve hour shifts and 1 eight hour shift. If the employee is required to attend roll call, he/she shall be given credit for 15 minutes before each shift to attend and 15 minutes after each shift for exiting purposes. The 30 minute roll call allowance cannot be used to calculate the minimum in each period.” (Emphasis added.)

- Personnel Director's Procedures P-3-42 Time records must be certified by both the employee and the supervisor and are the basis for overtime calculation and compensation.
 - Personnel Director's Procedure P-3-45 On Call is a premium pay for eligible employees specifically assigned, in advance, to such status. Freedom of movement is significantly restricted; however, the employee is still free to use this personal time effectively.
137. Warden Abbott stated, "Your destructive actions, insolent behavior and serious lack of leadership create a grave concern for me. . . Your obstinate failure to follow Major Maifeld's written directive regarding the assignment of Officer Dickens could have compromised a major criminal investigation and resulted in a potentially volatile situation. The example you have set for your subordinate staff is extremely destructive and fails to demonstrate a high level of professionalism required of your leadership position. The evidence clearly supports that you deliberately choose to ignore instructions, you continue to make decisions without authorization of the chain of command, and you continually violate policies and procedures."
138. On February 1, 2004, Pfaff was involuntarily transferred to the Colorado State Penitentiary.

DISCUSSION

A. CORRECTIVE ACTION

Complainant has the burden of proof to demonstrate that the July 1, 2003 Corrective Action was arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Complainant did commit insubordination on June 25, 2003. He refused to call other lieutenants in order to fill the July 2003 schedule. Captain Scott's order was routine; it was his job to assure that the lieutenants under his supervision complete the staff schedule in a timely manner.

Complainant was ill on June 25, 2003. He was extremely upset about his layoff and the unknown status of his future employment. Moreover, he was suffering from high blood pressure, chest pains, and dizziness. These are certainly mitigating factors that Warden Abbott could have

given more weight. However, Warden Abbott sought to assure that the command control structure at DOC remained in place; as warden, it was within his discretion to issue a corrective action to assure that occurred.³

B. DISCIPLINARY DEMOTION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse the agency's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. COMPLAINANT DID NOT COMMIT THE ACTS UPON WHICH DISCIPLINE WAS BASED

Respondent has the burden of proof to establish that Complainant committed the acts upon which discipline was based. The evidence does not support the conclusion that Complainant committed insubordination, falsified time sheets, or refused to follow either of Major Maifeld's November 5, 2003 orders. The preponderance of the evidence demonstrated that upon receipt of Maifeld's November 5 email regarding Officer Dickens, Complainant and his supervisor, Captain Dean, used their best judgment to assure that Dickens would be placed on the unit that posed the least physical danger to her injured arm. Their intention was to comply with the order. Nothing in the November 5 order mandated that Officer Dickens be kept out of Cellhouse 7; therefore, neither Pfaff nor Dean had any idea that they were violating Major Maifeld's intent.

The weight of the evidence also demonstrated that Lt. Pfaff stopped using the on call schedule after receiving Maifeld's email order. Lastly, no evidence supported Respondent's

³ It is noted that Respondent erred in concluding that employees may not have a representative sign a grievance on their own behalf. Board Rule R-8-8 provides that employees may "be represented by any person of the employee's choice at any step(s) of the grievance process." That provision includes initiation of the grievance. Any agency grievance rule that conflicts with R-8-8 is void as noncompliant with R-8-8, which mandates, "Each department must establish a process which complies with the following."

conclusion that Pfaff engaged in manipulation of payroll information. The information upon which Warden Abbott relied on this claim was erroneous: either Pfaff did not create the documents relied on, or the information used was incorrect.

Turning to the corrective action, the preponderance of evidence demonstrated that Complainant had a good faith belief that he did not have to attend the training class and send a letter of apology to Captain Scott until his grievance had been processed. At the time the disciplinary action was imposed, DOC was still processing his grievance of the Corrective Action. DOC refused to accept Complainant's grievance until he signed it himself in late November 2003. In January 2004, DOC was still processing the grievance at the time Warden Abbott issued the disciplinary action. Complainant's counsel directed him not to take the training course and write the apology letter until after the grievance had been resolved. Under these circumstances, no evidence supported a determination that Lt. Pfaff engaged in gross insubordination by failing to comply with the corrective action. While the grievance did not serve to toll the deadline for complying with the Corrective Action, Complainant's failure to so comply does not serve as a sufficient basis to demote him.

III. RESPONDENT'S IMPOSITION OF DISCIPLINE WAS ARBITRARY AND CAPRICIOUS AND CONTRARY TO RULE OR LAW

Based on the evidence noted above, Complainant did not commit the acts upon which demotion was based. When an agency fails to prove that just cause existed to impose disciplinary action, the discipline cannot stand. Colo. Const. Art. 12, section 13(8); section 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

In determining to demote Complainant, the appointing authority did not attempt to procure evidence he was required to consider prior to imposing discipline. Neither the appointing authority nor his designee performed an investigation into any of the primary three bases for discipline. No attempt was made to gain a true picture of what actually occurred. Prior to imposing disciplinary action as serious and permanent as a demotion, it is essential that the agency make a determined effort to investigate the basis for the demotion. *Lawley, supra*.

No one at Territorial verified that Pfaff worked graveyard shift in July 2003. No one established that Pfaff was responsible for inputting timesheet and payroll information in August 2003. No one spoke to either Pfaff or Officer Sheriff to learn whether there was a simple

explanation as to why it appeared she did not work on September 17, 2003. No one spoke to either Pfaff or Captain Dean to find out their thinking process upon receipt of the November 5 email concerning the assignment of Officer Dickens to Cellhouse 5. No one spoke to staff on graveyard shift after the November 5 memo to confirm that Complainant continued to use the on-call procedure. Lastly, instead of contacting Complainant or his attorney to set a meeting to discuss the allegations against him, the appointing authority chose not to meet at all. Finding of Fact Number 132.

Under these circumstances, Respondent has neglected or refused to use reasonable diligence and care to develop the evidence essential to make a demotion decision. Respondent gave no consideration to evidence it was required to consider prior to imposing discipline, namely, information Complainant would have provided at a pre-disciplinary meeting. In view of the longstanding requirement (in Board Rules R-6-10 and R-6-6) that appointing authorities must meet with the employee to consider mitigating information prior to deprivation of their property right to employment, no reasonable appointing authority would impose a demotion under the circumstances presented herein. Respondent demoted Complainant in violation of all three prongs of *Lawley*.

Respondent violated Rule R-6-10

Complainant argues that Respondent violated Board Rule R-6-10. That Rule requires,

“When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision. The appoint authority and employee are each allowed one representative of their choice. . .

- A. When reasonable attempts to hold the meeting fail, the appointing authority must send a written notice, to the last known address of the employee, advising the employee of the possibility of discipline and stating the alleged reasons. The employee has 10 days from receipt of the notice to respond in writing.”

Respondent demoted Complainant for violating the July 2003 Corrective Action, and for a different set of new alleged performance issues. With respect to the Corrective Action issue, Complainant’s attorney asked Warden Abbott to be sure her office was contacted in setting a date for the pre-disciplinary meeting. When an employee is represented by an attorney in the pre-disciplinary process, a “reasonable attempt” to meet consists of confirming a date with either the employee or the lawyer, prior to setting the date for the meeting. In this case, the appointing authority never contacted either the employee or the lawyer prior to setting dates for the pre-disciplinary meeting. While Respondent argues that it became frustrated with its attempts to set the meeting, the simple act of making a telephone call to Complainant or his attorney to set a date would have fully alleviated that frustration. Respondent’s failure to make contact with Complainant or his

attorney in order to set a mutually satisfactory date for the pre-disciplinary meeting regarding noncompliance with the Corrective Action was unreasonable. Therefore, Respondent violated R-6-10 by failing to make a reasonable attempt to hold the pre-disciplinary meeting concerning the alleged violation of the Corrective Action.

With respect to the three new performance issues raised in Warden Abbott's January 8, 2004 letter for the first time, Warden Abbott did not try to schedule any pre-disciplinary meeting to discuss those issues. R-6-10 states, "When considering discipline, the appointing authority **must meet** with the certified employee. . . ." (Emphasis added.) Rule R-6-10 requires a pre-disciplinary meeting so that the appointing authority can present information about the reason for potential discipline and disclose the source of that information. Respondent's January 8 letter provided Complainant none of that required information. Finding of Fact #125 illustrates that one sentence on each alleged performance issue was provided. Complainant had no meaningful notice of the nature of the alleged misconduct upon which proposed discipline was based.

Only if "reasonable attempts to hold the meeting fail" may the appointing authority bypass the meeting required by Rule R-6-10. Here, because no attempt was made to hold the pre-disciplinary meeting, Respondent violated R-6-10 in imposing discipline based on the new issues cited in the January 8, 2004 letter.

Finally, Respondent wrote the demotion letter prior to the expiration of the ten-day deadline given to provide mitigation on the one-sentence descriptions of performance issues. Complainant's attorney gave four dates to Respondent on which to hold the pre-disciplinary meeting. Respondent did not respond to that offer. Under these circumstances, Respondent prejudged the case in violation of Rule R-6-10. *See, Shumate v. State Personnel Board*, 528 P.2d 404 (Colo.App. 1974)(the pre-disciplinary meeting "must afford the employee a reasonable chance of succeeding if he chooses to avail himself of the opportunity to defend himself.").

Respondent Violated Board Rule R-6-6

Board Rule R-6-6 mandates that in imposing corrective or disciplinary action, appointing authorities must consider mitigating circumstances and information presented by the employee. Respondent failed to obtain and consider any mitigating circumstances or information presented by Complainant herein, in contravention of Rule R-6-6.

It is noted that Complainant requested rescission of the non-disciplinary suspension with pay on January 8, 2004, during the pendency of the investigation into the December 2003 mini-riot. Under State Personnel Board Rule R-6-9, "Administrative leave during a period of investigation is not a disciplinary action." The suspension is a standard procedure and will not be rescinded.

IV. ATTORNEY FEES

Complainant requests an award of attorney fees and costs. Section 24-50-125.5, C.R.S. mandates that attorney fees and costs be awarded when a personnel action or appeal thereof is

instituted “frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless.” Board Rule R-8-38(A)(2) defines a personnel action made in bad faith, maliciously, or as a means of harassment as one “in which it is found that the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth.”

The facts of this case demonstrate that Respondent’s demotion of Complainant was made in bad faith and was disrespectful of the truth. The lack of any investigation demonstrates a disrespect for the truth. The appointing authority’s choice to violate Rule R-6-10 by failing to offer the Complainant the opportunity to attend a pre-disciplinary meeting on the three major bases for demotion is evidence of bad faith and a disrespect for the truth. *See, Mayberry v. Univ. of Colo. Health Sciences Center*, 737 P.2d 427 (Colo. App. 1987)(willful disregard of a Board rule is bad faith *per se*). Respondent’s decision to ask its employees to gather evidence against Complainant, to be used as the basis for imposing discipline, demonstrates bad faith. Lastly, because the appointing authority wrote the demotion letter prior to the deadline for responding to the January 8 letter, and without attempting to have a pre-disciplinary meeting concerning three of the four bases for demotion, he prejudged the case. This also constitutes bad faith. *See, Renteria v. Department of Labor and Employment*, 907 P.2d 619 (Colo. 1994).

CONCLUSIONS OF LAW

1. The Corrective Action was not arbitrary, capricious, or contrary to rule or law;
2. Complainant did not commit the acts upon which discipline was based;
3. Respondent’s demotion of Complainant was arbitrary and capricious and contrary to rule or law;
4. Complainant is entitled to an award of attorney fees and costs incurred in appealing the demotion.

ORDER

The Corrective Action is **affirmed**. The disciplinary demotion is **rescinded**. Respondent shall reinstate Complainant to the rank of Lieutenant retroactive to the date of demotion. Complainant shall receive full back pay and benefits to the date of demotion. Respondent shall pay Complainant’s reasonable attorney fees and costs incurred in appealing the demotion.

DATED this ____ day of
February, 2005, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420

Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the _____ day of **February, 2005**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Sandra L. Wright, Esquire
Post Office Box 746298
Arvada, Colorado 80006-6298

And in the interagency mail to:

Melanie Sedlak
Christopher Baumann
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
